



**WASTE CONTRACTORS
AND
RECYCLERS ASSOCIATION
OF N.S.W.**

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**The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 1199
Dickson ACT 2602**

27 July, 2004

Dear Sir,

**Pre-Decision Conference
Authorisation no. A30231
Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove
Council, North Sydney Council, the City of Ryde, Willoughby City
Council, Mosman Municipal Council and Warringah Council (the
Northern Sydney Councils) Submission**

~~**Strictly Private & Confidential**~~

We refer to Authorisation No. A30231 and set out below in writing the submissions that our Association will deliver at the Pre-Decision Conference dated Tuesday 27 July 2004.

As previously advised to your Commission, our Association is a peak employer body representing the commercial and industrial interests of its members, who operate in the waste and recycling industry within NSW. We have 62 members and our members have direct controlling interests in an estimated 95% of the available commercial waste collection vehicles within NSW. Our understanding is that wherever a Council contracts out its waste and /or recycling service it does so to one of our members.

We believe that our Association is well placed to provide you with comment on this proposal as the specialized waste and recycling activities in this proposal are at the core of the services provided by our members. In fact, several of our members are currently commercially involved with the Councils in the collection, processing and / or disposal of the waste streams referred to in this application.

In the first instance we submit that the Commission should not accept the submissions of the Councils that the public benefits outweigh the anti-competitive effect of the proposed arrangement and therefore the Commission should not grant any authorisation for the proposed conduct.

However, if the Commission is of the view that it will grant authorisation then the Association recommends that the following conditions be applied to any authorisation;

- i. Authorisation should be restricted to the requirements of the Councils that relate to the disposal and/or treatment of waste and/or recyclables at waste transfer stations, processing facilities, landfills and beyond. The authorisation should not relate to the kerbside collection of waste and/or recyclables and its transport to above referred to waste facilities. The documentation prepared by the Councils is far from clear on this issue. (See our comments below concerning definitions).
- ii. All proposed contracts should provide adequate lead times to allow for the required approvals to be obtained. The possible entry to the market of other service providers is limited by the extensive time delays that apply to the obtaining of approvals to undertake the work envisaged;

The Association hereby requests the Commission take further consideration of the following issues in any assessment of whether it will grant authorisation to the Councils.

1. Critical Definitions

The Association is of the view that little attention has been given to the definitions of a number of words used by the Commission, the Councils in their tenders and the industry. The words of particular concern to the Association are not words of art as such but common words that have developed specific meanings over time by the industry. These words have had different meanings when used by the ACCC and/or the Councils.

An understanding of the following words is crucial to the industry and it is submitted very important to ensure that no unintended consequences of the tender take place, particularly circumstances that could entail a detriment to consumers of the services, that is domestic rate payers, not the individual Councils.

The following words require specific attention:-

- **waste transfer**
- **waste processing**
- **waste collection**
- **kerbside**
- **kerbside collection**

The issue for the Association is the apparent misuse of these terms by the ACCC and the Councils. The Association advises that both Councils and the waste collection industry had generally adopted the practice for a number of years of differentiating between the collection of domestic waste and/or recyclable material from the kerbside of domestic residences and its transport to waste transfer stations, processing facilities and/or landfills and the transfer of this material from waste transfer stations to landfills or other such facilities.

- 2. The Association is of the view that the Application for Authorisation IS NOT for the Kerbside Collection of Waste and/or Recyclable Materials.** The Association is of the view that the Application DOES NOT relate to the kerbside collection of waste and/or recyclable material from domestic

residences and its transport to waste transfer stations, processing facilities and landfills. The Association is of the view that it is very important to draw this distinction.

The Association is of the view there are potentially significant anti-competitive outcomes to be obtained if the Commission grants an authorisation to the Councils to provide for collective tendering of contracts for the kerbside collection of domestic waste and/or recyclable material.

The Association requests that if the Commission intends to grant authorisation to the Councils that it does so only for the activities of processing waste and/or recyclable material at waste transfer stations, the transfer of waste from such transfer facilities to landfill and/or waste processing facilities or such other authorised or legal waste facility.

The Association is strongly of the view that any application for authorisation of a collective tender for kerbside collection of waste and/or recyclable material should be the subject of a further separate application. The Association also relies upon its previous submissions which detail concerns of the anti-competitive effects of this Application.

3. Pre-Eminent Position of WSNSW

The Association directs the Commission to its submissions concerning the physical structure of the market in Sydney for the disposing of domestic waste including the pre-eminent position of the WSNSW, as the owner and operator of the majority of waste transfer stations and landfills in the greater Sydney area for the receipt of solid waste class 1. The Association is of the view there is little or no competition at this time for the disposal of domestic waste from waste transfer stations into landfills or other legal facilities. A collective tender thus may result in encouraging new entrants into the market for waste transfer stations, waste processing and landfills, however the long lead times for the approval process makes such an outcome problematical. The Association notes the significant time it has taken Collex Waste Management to obtain all the approvals for Woodlawn and the Clyde inter-modal transfer facility and the fact that WSNSW has not secured any additional solid waste class one landfill sites within NSW in the last 20 years.

The application by the Councils appears to assume that competition will be enhanced by their tender but the Association is of the opinion there is simply no evidence to support this position. The barriers to entry to the downstream part of the process from the waste transfer station onwards are substantial. The major barrier to entry is not necessarily financial in respect to the capital costs (although these are significant) for equipment but the significant delays and costs in obtaining planning approvals. The Association again confirms its opinion there are two distinct parts of the market. The barriers to entry in relation to kerbside collection work are much smaller than for contracts from the transfer station and onwards. Kerbside collection contracts require specialised waste vehicles and mobile garbage bins but no substantial approval process (other than the internal approval process of the tenderer) so it is in essence one of financial issues only.

This was the essence of our previous submission concerning the length of time for tenders which would allow the very long approval process to take place. However these times can be several years and it is critical that Councils factor in adequate time periods to allow other service providers to be

encouraged to enter the market for the provision of services for the transfer, processing and disposal of solid waste class one and recyclable materials.

The WSNSW has significant market power and the Association is of the opinion that it is now prepared to use that market power to secure its position. Indeed the Association is of the view that the WSNSW not be allowed to use its power in an inappropriate manner to maintain its position and indeed to expand its power and market position. **The Association is of the opinion the proposal for authorisation of collective Council contracts will further entrench the position of the WSNSW and enhance its position in the market to the potential substantial detriment of any resident rate payer in the Council areas as this pre-eminent position of the WSNSW does not encourage competition and therefore will not lead to a better cost outcome for residents.**

4. Collective contracts are not the Issue but the Term of such Contracts May Be

The Association does not *per se* object to the Councils seeking to undertake a collective tender. The Association supports the process of eliminating the enormous work required to adequately respond to a local government tender by its members. As the Councils can save money on the tender process so can the members of the Association in their response. These savings have the potential to result in lower costs for the members and therefore the possible lowering of the prices for the services.

However, the Association remains very concerned at the length of term of the authorisation at this time. If the ACCC accepts that the contracts are for waste transfer and processing facilities and the transport from them and the disposal of the waste and recyclable materials from such facilities and not for kerbside collection of waste and recyclable materials there are only two operators that have capacity at this time to tender for such services and undertake the work immediately. Those two contractors are the WSNSW and Collex. No other possible service provider has facilities available at this time to undertake the work envisaged. Given time an operator may be able to secure some facilities but no other operator can undertake the services today other than the WSNSW and Collex. Of these two companies Collex is at a substantial disadvantage in that it has only one facility at Clyde in Sydney whilst the WSNSW has eight waste transfer stations, three landfill sites, one materials processing facility and one alternate waste processing facility all located throughout greater Sydney and indeed several of these sites are located within close proximity to these Council areas.

Until the Collex facility commenced operations the WSNSW maintained a statutory monopoly in Sydney. For many years this monopoly was encouraged and protected by NSW Government legislation. The Association advises that the industry practice prior to the recent long term contracts offered by the Councils was not to have long term contracts with the WSNSW. As the NSW Pricing Tribunal set the price for waste services for the WSNSW there was nothing to be gained or lost in having long term contracts. However with the advent of the entry of Collex into the market as direct competitor, the WSNSW has done two things that have significant anti-competitive implications for any domestic rate payers. The WSNSW has sought to enter back to back agreements with any organisation that seeks to tender for the Council work (in the case of Fairfield City Council a 20 year

contract was entered into). This has insured that the WSNSW will retain the revenue from this Council for a very long term – in fact much greater than the traditional 5, 7 and 10 year terms that were until this case the accepted business practice. **The Association is of the view that if this is allowed to happen again that this has the potential to preclude the entry of other possible suppliers of waste transfer stations, processing facilities and solid waste class one landfills and this will be to the substantial detriment of all rate payers.**

Indeed the Association is of the view that the WSNSW has been actively involved in aggressively pursuing its revenue base in a manner that may contravene section 46 of the Trade Practices Act as part of this process and directly related to the collective tendering by Councils. Indeed it may be that the collective tendering process is aiding and abetting this possible breach by the WSNSW. The Association is of the opinion that in such circumstances it would be inappropriate to grant this Authorisation and that further investigations should take place.

The Association notes that a recent tender for services by Fairfield City Council for alternative waste processing, recyclable materials processing and disposal resulted in the view of the Association in an outcome that should not be considered in any way favourable to the residents and rate payers of Fairfield City Council and therefore quite objectionable. We have been advised that Fairfield City Council sought expressions of interest for the provision of alternative waste processing, recyclable materials processing and disposal services. We are instructed that no limitation was placed on where this activity was to commence and nine parties, all of whom we understand were reasonable size businesses in the waste industry including the WSNSW expressed an interest that they would be interested in proceeding further. The Council drafted a tender which the Association believes was clear in its intent that the activity to which the tender related was the processing of waste and recyclables. The Association understands that the Council only received one tender response to its tender from the WSNSW. The Council then granted a 20 year exclusive agreement to the WSNSW which included an extension of its services to include the kerbside collection of recyclable materials. The WSNSW has now acquired vehicles and employees to undertake this work. No tendering of the transport component, including kerbside collection of this work took place nor did any discussion with other competitors take place. The Association is of the view that such an outcome is not in the best interests of the rate payers and residents of Fairfield. The Association is of the view that there is no justification for this outcome. **The Association is further of the opinion that there are no financial incentives to the WSNSW to undertake the service in the most cost effective way or to provide any innovative environmental solutions for problems that may arise. The Association is strongly of the view that there is no justification for a 20 year contract in such circumstances. Further Fairfield City Council should not have awarded a kerbside collection contract without first openly seeking tenders for a kerbside collection service.**

The Association accepts that Fairfield City Council is not a party to the collective tender which is the subject of this response by our Association but the above is cited as an example of the way that the WSNSW undertakes its business and will continue to undertake its business if given an unfair opportunity to do so. **The approval by the ACCC of a long term contract and/or any element of kerbside collection in this Application will in the**

Association's view potentially allow a compounding of the problem that has been caused by the Fairfield Council contract.

5. The Association notes that the Councils are claiming that the following benefits will flow from the authorisation to undertake a collective tender:-
- a. Fostering of business efficiencies
 - b. Better use of resources as a result of industry rationalisation
 - c. Encouragement of employment
 - d. The promotion of cost savings
 - e. The encouragement of economic development and capital investment;
 - f. Improvement in the quality and safety of goods and services;
 - g. The promotion of competition;
 - h. The development of equitable dealings in the marketplace.

The Association is of the view that none of the above suggested benefits will necessarily be an outcome from a collective tendering procedure.

Comments upon 5(a)

The Association accepts that business efficiencies and economies of scale can take place where an aggregation of the existing Council business takes place. However the distinct advantage enjoyed by the WSNSW in relation to the location of its waste transfer stations and landfill sites does not necessarily translate to benefits to be enjoyed by Councils when third party service providers then provide the collection and processing services for the waste. The distances waste collection vehicles must travel from kerbside collection locations to the transfer stations is crucial to an efficient cost effective service.

Comments upon 5(b)

The Association disputes that there is necessarily a better use of resources because of collective tendering process. The recent bin change-over at Canada Bay Council is noteworthy where all bins in the municipality were replaced (including bins less than 6 months old) by the new contractor as part of a contractual obligation. The maximisation of any perceived cost efficiencies were completely lost by such a wasteful use of resources. The Association is aware that some of these bins will be cleaned and re-used by other third party supplier of bins but this is secondary to the change over procedures that were required under the contract.

Comments upon 5(c)

The whole basis of what the Councils are seeking is a reduction in cost of the total services and any contractor will be seeking to limit its employees. There is nothing to indicate in any of the material that there will be a nett gain of employment under any of the contracts and indeed the Association is of the firm view that all that generally happens when contracts change hands in the waste industry is that a transfer of labour takes place.

Comments upon 5(d)

The Association accepts that cost savings are an important part of the policy position of the Councils. The Association submits that only through the active

competition of its members and other suppliers of the required services will there be any reduction in the costs to rate payers. As we have noted previously there is nothing in the Council proposals that will lead to increased competition. Most of what the Councils have said on this issue is in the nature of "motherhood" statements about competition. There is simply no evidence produced to support the argument that the proposal will result in new entrants arriving in the market, indeed by allowing very long term contracts at this time the Association is of the view that this has the potential to lock out future entrants as the services will be tied up for many years. There is nothing in the Council proposals to encourage new entrants to undertake the expense and time necessary to obtain approvals to operate a new waste transfer facility, processing facilities and solid waste class one landfill facilities.

Comments upon 5(e)

The Association is again of the view that there is no evidence to support the proposition that the Councils' proposals will result in further economic development and capital expenditure. Indeed we re-state our point from above that by allowing very long term contracts at this time there is the very real potential to lock out future entrants as the services will be tied up for many years.

Comments upon 5(f)

The Association submits that there is no evidence to support the contention that there will be an improvement in the quality and safety of goods and services (the subject of the tender). The history of the waste management industry is that capital innovation has generally come from operators seeking to remain competitive. For example one man operator waste vehicles were invented in the back yard on the NSW north coast. This procedure is now the accepted form of practice and has indeed spread throughout the world.

Comments upon 5(g)

The Association particularly takes issue with the Councils' submissions that the proposal will result in increased competition. There is simply no evidence to support this proposition and indeed we again re-state the Association's contention that the long lead times for the approvals of waste facilities means that until this issue is solved the granting of long term contracts to any party has the exact opposite effect to increasing competition. This outcome or indeed even the risk of this outcome is in no ones interest except those parties who are successful in securing the contract. It will certainly not be in the interest of any Council Rate Payer who will ultimately be paying for the service.

Comments upon 5(h)

The last matter submitted by the Councils is that the proposal will provide for the development of equitable dealings in the marketplace. The Association does not accept that the current practices are not equitable which by inference the Council is asserting. Local government tenders are subject to substantial analysis and the current practices in relation to competitive tendering. The Association believes the current processes have been quite transparent and that the Council Rate Payers have received very competitive outcomes in the circumstances. The Association is of the view there is no evidence to support the proposition that the collective tendering producer will increase equitable dealings between the various parties.

We again emphasise that it is our view there are no net gains to be made for Rate Payers by granting Authorisation No. A30231 and we request that no grant be made.

The above are the Association's submissions.

Our Association thanks you for the opportunity granted to us today in making this presentation.

Yours faithfully

Tony Khoury
Executive Officer

A handwritten signature in black ink, appearing to be 'TK' or similar initials, written in a cursive style.